UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHARON STALEY, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	CASE NO. C09-1424-JLR REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Sharon Staley proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REMANDED for further administrative proceedings.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1974.[1] She completed high school, attending special education classes. (AR 270.) Plaintiff previously worked as a cashier, retail clerk, and companion. (AR 51, 263.)

Plaintiff filed applications for DIB and SSI in August 2002. (AR 145, 357, 360.) On February 9, 2005, an ALJ issued a decision finding plaintiff able to perform her past relevant work as a home companion and, therefore, not disabled. (AR 135-45.) On May 24, 2006, this Court affirmed the ALJ's decision.

Plaintiff filed new applications for DIB and SSI in June 2006. (AR 231-32, 258.) She alleged disability beginning September 1, 2002 due to fibromyalgia, deformed feet, bilateral hearing loss, deformed disc in lower back, depression, bipolar disorder, cysts in ovaries, high cholesterol, and gastro esophageal reflux disease (GERD). (AR 258, 262.) Her applications were denied at the initial level and on reconsideration, and she timely requested a hearing.

On May 20, 2009, ALJ Wayne Araki held a hearing, taking testimony from plaintiff and vocational expert William Weis. (AR 87-130.) On June 17, 2009, the ALJ issued a decision finding plaintiff not disabled. (AR 39-53.) He found that the only period at issue began on February 10, 2005, the day after the previous decision, and that the presumption of continuing non-disability had been rebutted based on the evidence of new severe impairments since the prior decision. (AR 40.) The ALJ also found that plaintiff met the insured status

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

requirements of the Social Security Act through September 30, 2007. (AR 41.)

Plaintiff timely appealed. The Appeals Council, on August 19, 2009, denied plaintiff's request for review (AR 4-6), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found that plaintiff had not engaged in substantial gainful activity (SGA) since February 9, 2005, the date of the prior decision. He concluded that plaintiff's part-time work at a teriyaki shop in 2008 did not rise to the level of SGA, but was relevant to the determination of residual functional capacity (RFC).

At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's back disorder, arthritis in the shoulders, elbows, and hands, deformed feet, bilateral hearing loss, and schizoaffective disorder severe. He found a number of other impairments, including asthma, hand tremor, GERD, ovary cysts, high cholesterol, learning disability, and bipolar disorder not severe.

Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ concluded plaintiff did not have an impairment or combination of impairments that met or medically equaled a listing.

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess RFC and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to lift or carry twenty pounds occasionally and ten pounds frequently, stand or walk for one hour intervals for up to six to eight hours in an eight-hour workday, and sit for two hour intervals for up to eight hours in an eight-hour workday. He further found plaintiff able to use the upper extremities for frequent reaching, handling, and fingering, to occasionally stoop, crouch, kneel, climb stairs and ramps, and to balance. The ALJ found that plaintiff should avoid climbing ladders or perform a job that requires hearing in an environment with loud ambient noise, but that she retained the mental functional capacity to remember, understand, and carry out simple and detailed, but not complex, tasks and instructions. With this RFC, the ALJ found plaintiff able to perform past relevant work as a retail sales clerk and companion.

If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. With the assistance of the vocational expert, the ALJ alternatively found plaintiff able to perform other jobs, such as work as an assembler, basket filler, semiconductor bonder, and table worker.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881

F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002)

Plaintiff argues that the ALJ improperly evaluated her hand tremor, understated her cognitive problems, inadequately assessed her credibility, improperly rejected lay testimony, and erred at steps four and five. She requests remand for further administrative proceedings. The Commissioner argues that the ALJ's decision is supported by substantial evidence and should be affirmed. For the reasons described below, the Court finds that this matter should be remanded for further administrative proceedings.

Step Two

At step two, a claimant must make a threshold showing that her medically determinable impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work activities" refers to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b). "An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting Social Security Ruling (SSR) 85-28). "[T]he step two inquiry is a *de minimis* screening device to dispose of groundless claims." *Id*. (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the "combined effect" of an individual's impairments in considering severity. *Id*.

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A. Hand Tremor

> Plaintiff takes issue with the ALJ's step two decision as related to her hand tremor:
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> In September 2006, the claimant reported having hand tremors for the past year. She complained of difficulty writing and doing things such as peeling shrimp or cutting her fingernails. On examination, Alison Schulman, M.D., noted that the claimant had a minor bilateral hand tremor when her arms were outstretched. At other times, Dr. Schulman observed no evidence of tremors. Dr. Schulman opined that the claimant's hand tremor was not significantly limiting. Based on Dr. Schulman's examination findings, I conclude that the claimant's bilateral hand tremor is non-severe.

(AR 42; internal citation to AR 845-86 omitted.)

Plaintiff points to a November 29, 2005 note from her treating physician, Dr. Doris Page, in which she complained about the worsening bilateral tremor and Dr. Page noted "[d]ifficulty with alternating hand movements." (AR 810.) Plaintiff observes that the remainder of the report is missing from the administrative record and argues that this warrants remand pursuant to sentence four or six of 42 U.S.G. § 405(g) (sentence four: "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."; sentence six of: "The court . . . may at any time order additional evidence to be taken before the Commissioner . . . , but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding[.]") She also points to a February 23, 2006 note from treating nurse practitioner Tina Christian, who observed a "fine tremor . . . in the hands bilaterally." (AR 808.)

Plaintiff argues that the ALJ applied the wrong legal standard in relying on Dr.

Schulman's opinion that the tremor did "not appear to be significantly limiting." (AR 42, 845.) She asserts that her hand tremor met the very low threshold of having more than a minimal effect on her ability to perform based work activities because it restricted her ability to use her hands for fine manipulation. She argues that, even if it did not meet this standard, the ALJ was still required to include associated limitations in the RFC finding, *see* 20 C.F.R. §§ 404.1545(e), 416.945(e), and that the failure to do so was not harmless given that all of her past relevant work and the jobs identified by the VE at step five require frequent handling or fingering (AR 122, 124).

The Commissioner points to medical opinions finding a lack of neurological impairments (AR 726, 754), an evaluating physician's failure to list hand tremors as an impairment in a January 2006 evaluation (AR 751), and 2006 and 2007 assessments by a reviewing physician consistent with the opinions of Dr. Schulman (AR 877, 918). The Commissioner asserts that, because the evidence showed plaintiff's hand tremors did not impact her ability to perform basic work activities, the ALJ's finding was supported by substantial evidence. He maintains that the ALJ reasonably interpreted Dr. Schulman's opinion that the hand tremors were not significantly limiting as indicating a lack of interference with basic work activities. The Commissioner further asserts that the ALJ appropriately included manipulative limitations in limiting plaintiff to work that required only frequent, as opposed to constant, reaching, handling, and fingering. *See* SSR 83-10 ("'Frequent' means occurring from one-third to two-thirds of the time.")

The Commissioner rejects the argument that the omission of Dr. Page's complete record warrants remand. He maintains that the ALJ's duty to further develop the record was not

triggered because the record was adequate to allow for proper evaluation of the evidence. *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001) ("ALJ's duty to develop the record further is triggered only when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence.") He asserts that, in light of the remaining treatment notes from Dr. Page and Dr. Schulman's evaluation, the record was sufficiently developed.[2]

The November 29, 2005 treatment note from Dr. Page reflects plaintiff's report as to the tremor, including her observation that it had started to worsen, but is incomplete as to Dr. Page's opinions. (AR 810.) The only legible portion of those opinions includes the observation: "Difficulty with alternating hand movements." (*Id*.) At least two comments, coming before and after that observation, are not complete, presumably due to some type of copying error.

The ALJ does not mention Dr. Page's treatment note and, instead, focuses solely on the report of examining physician Dr. Schulman. (AR 42.) While the ALJ did not err in relying on Dr. Schulman's examination findings and opinion as supporting the conclusion that plaintiff's hand tremor was not severe, the incomplete treatment note from Dr. Page created an ambiguity in the record as to this impairment and should have prompted the ALJ to either acquire the complete note or to contact Dr. Page for further information. 20 C.F.R. §§

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2 The Commissioner also indicated he would verify whether a complete copy of Dr. Page's incomplete record was actually presented to the ALJ. However, there was no further submission from the Commissioner on this subject. The Commissioner did submit a new electronic administrative record (given the discovery of two pages relating to a different claimant) which contains the same copy of Dr. Page's November 29, 2005 report. (Dkt. 23-13 at 5.)

404.1512(e), 416.912(e) (an ALJ has an obligation to recontact a treating physician or psychologist when the evidence received is inadequate for a determination of disability); *accord Mayes*, 276 F.3d at 459. The Commissioner's suggestion that the ALJ accounted for any related limitations at step four by finding plaintiff capable of "frequent reaching, handling, and fingering[]" is not persuasive. (AR 45.) To the contrary, this would seem to correspond only with the conclusion that the hand tremor was not severe.

On remand, the ALJ should pursue the ambiguity relating to Dr. Page's November 29, 2005 treatment note. As it is not clear whether the complete report from Dr. Page would be considered "new evidence," a sentence four remand is appropriate in this case. § 405(g).

B. Fibromyalgia

Plaintiff also raises a step two argument in her challenge to the credibility assessment. She notes ALJ Schellentrager's 2005 finding of severe fibromyalgia (AR 140) and asserts that the current ALJ gave that prior decision res judicata effect (AR 39). She also points to new evidence confirming the diagnosis of this condition. (AR 727 (January 2005 report from Dr. Lance May deeming plaintiff's fibromyalgia to be of marked severity (reflecting very significant interference with work-related activities)); AR 751 and 921 (January 2006 and May 2007 reports from Dr. Jay Brown deeming plaintiff's fibromyalgia to be of moderate severity (reflecting significant interference with work-related activities)); AR 755 (November 2005 report signed by physician's assistant Stephen Leaf and Dr. Brown deeming plaintiff's fibromyalgia to be of marked severity); and AR 845 (Dr. Schulman diagnosed fibromyalgia in August 2006 report).) Plaintiff argues that the ALJ erred in failing to recognize or include this impairment in his step two finding, to consider it in evaluating her credibility, and to provide

legally requisite reasons for rejecting the relevant medical opinions, *see Lester v. Chater*, 81 F.3d 821, 829 (9th Cir. 1996) (standards for evaluating medical opinions, discussed *infra*).

The Commissioner asserts that the ALJ accepted that plaintiff presented medical evidence of an impairment that could reasonably be accepted to cause joint and back pain. (AR 46-47.) He points to Dr. Mark Heilbrun's January 2003 report describing plaintiff as having joint pain consistent with fibromyalgia (AR 617-22) and plaintiff's testimony that her medication helped with her fibromyalgia (AR 107). The Commissioner maintains that the consideration of fibromyalgia at step two would not have changed the ALJ's findings and that the omission can, therefore, be deemed harmless. *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (recognizing application of harmless error in Social Security context where a "mistake was nonprejudicial to the claimant or irrelevant to the ALJ's ultimate disability conclusion.")

Plaintiff's assertion as to the res judicata effect of the prior ALJ decision is inaccurate. The ALJ did not accept and incorporate all of the prior ALJ's findings. Instead, he appropriately addressed the presumption of continuing non-disability and concluded it had been rebutted by evidence of new severe impairments. *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988) ("The principles of res judicata apply to administrative decisions[.] The claimant, in order to overcome the presumption of continuing nondisability arising from the first administrative law judge's findings of nondisability, must prove 'changed circumstances' indicating a greater disability.") (citations omitted).

However, the Court finds the ALJ's decision with respect to fibromyalgia deficient. In the most recent hearing, plaintiff testified as to a worsening of her symptoms in her back, feet,

ankle, joints, and arthritis in her shoulders, as well as symptoms in her elbows and hands. (AR 98-102.) She also directly discussed her fibromyalgia, both in relation to medication (AR 107) and to her symptoms, including aching, soreness in her joints and muscles, and fatigue (AR 115). Additionally, as noted by plaintiff, the record contained numerous new opinions as to fibromyalgia. (AR 727, 751, 755, 845 and 921.)

The ALJ recognized that plaintiff listed fibromyalgia in her disability report (AR 45) and, without mentioning the condition itself, described plaintiff's testimony as to back and feet pain, arthritis in her shoulders, elbows, and hands, and fatigue and soreness in her joints and muscles (AR 46). He also recognized the medical reports cited here by plaintiff and provided reasons for rejecting the opinions in those reports limiting plaintiff to sedentary work. (AR 49.) However, there is no clear indication the ALJ considered plaintiff's fibromyalgia at step two or otherwise.

It could be that the ALJ would not have deemed plaintiff's fibromyalgia severe at step two or that, had he recognized this condition as severe, it would not have changed his conclusions. It is not clear whether the record contains evidence of the common test used for diagnosing fibromyalgia. *See, e.g., Sarchet v. Chater*, 78 F.3d 305, 306 (7th Cir. 1996) (describing rule of thumb that an individual must have at least 11 out of 18 specific "tender spots" on the body to be diagnosed as having fibromyalgia); SSR 99-2p (noting "American College of Rheumatology criteria for [fibromyalgia] (which includes a minimum number of tender points)"). The new reports recognizing plaintiff's fibromyalgia may well have been based on plaintiff's assertion of the diagnosis. For example, while Dr. Schulman recognized the condition, she appeared to base this on plaintiff's report and found that plaintiff had no

work-related restrictions. (AR 49, 841-46.) Two reports signed by physician's assistant David Warner, one or both of which appear to have been approved by a physician, also raise questions about this condition. (AR 930 (August 2007 report from Warner deeming plaintiff's fibromyalgia "(per hx)" of mild severity (reflecting no significant interference with work-related activities) and stating that fibromyalgia "is difficult both to diagnosis and to treat.") and AR 926-27 (January 2008 report from Warner deeming plaintiff's fibromyalgia of moderate severity, but finding plaintiff capable of light work, noting she had not obtained any significant treatment, and expressing concern as to how motivated plaintiff was in terms of improvement).) Additionally, another physician's assistant and a physician, in June 2008 and January 2009 respectively, deemed plaintiff's fibromyalgia to be of mild severity. (AR 934 and 939.)

Yet, the ALJ did not himself reach the conclusion that plaintiff's fibromyalgia was not severe and the Commissioner fails to sufficiently support his contention that the failure to consider this impairment was harmless. There is, for example, no indication the ALJ accounted for fibromyalgia symptoms in the step four finding. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (failure to list impairment as severe at step two harmless where limitations considered at step four). As such, the ALJ should be required to directly address the issue of plaintiff's fibromyalgia, at step two and all subsequent steps, on remand.

Cognitive Problems

Plaintiff asserts that she suffers from cognitive problems caused by a combination of her learning disabilities, bipolar/schizoaffective disorder, and pain. She maintains that the ALJ erred in finding her capable of performing detailed work despite these problems.

The ALJ considered plaintiff's learning disability as follows:

> In her February 2005 decision, Judge Schellentrager found evidence of a learning disability, but concluded it was non-severe because it did not significantly interfere with the claimant's activities. This finding was upheld by the Appeals Council and the District Court. While a psychological evaluation by Cherie Valeithian, Ph.D., in January 2006 confirmed the diagnosis of learning disability, I continue to find, for similar reasons noted by Judge Schellentrager, that the claimant's learning disability is non-severe. First, in her function reports, the claimant reported having no problems remembering things, concentrating, completing tasks, understanding, or following spoken or written instructions. Second, the record indicates that she was taking courses in child development, a three-quarter program, at Renton Technical College in 2006 and 2007. In February 2007, she reported plans to graduate from the program in April 2007. Finally, in 2008, she worked as a server and food prep worker at a teriyaki restaurant. At the hearing, she testified that she left this job only because she was laid off of work. She did not report any cognitive problems learning or performing the job. I conclude that the claimant's learning disability is non-severe because it does not result in any significant functional limitations.

(AR 43; internal citations to record omitted.) ALJ Schellentrager had relied on plaintiff's average to superior IQ testing results and the opinion of the testing physician that plaintiff's IQ did not preclude her from performing her then current work as a caretaker, or other employment duties, and that plaintiff "'demonstrated an ability to maintain persistence and pace, cooperate with instructions, and complete simple and complex tasks.'" (AR 139-41.) ALJ Schellentrager also pointed to plaintiff's report to another physician that she had no difficulty concentrating when watching movies or engaging in daily activities. (AR 141.)

The ALJ considering plaintiff's current claim did find her schizoaffective disorder severe. However, he deemed her bipolar disorder non-severe, pointing to Dr. Valeithian's assessment of the condition as mild with medication and plaintiff's report that her manic symptoms occurred only one to two times per year. (*Id.*)

The ALJ found plaintiff had moderate difficulties with concentration, persistence, and pace, explaining:

> She has a history of auditory hallucinations, but they have been controlled with medications. She drives, does puzzles, and manages her finances. She can follow spoken and written instructions well. She can complete tasks. She does not have significant memory or concentration difficulties. In 2006 and 2007, she was taking classes in child development at Renton Technical College. In 2008, she worked part-time at a teriyaki restaurant without any documented cognitive problems; she was laid off only due to lack of work.

(AR 44; internal citations to record omitted.) He concluded plaintiff was capable of performing simple and detailed, but not complex, tasks and instructions:

> The claimant's results on cognitive testing indicates that she retains the ability to perform simple and detailed, but not complex, tasks. For instance, on the Wechsler Adult Intelligence Scale (WAIS-III) in January 2006, she obtained a verbal IQ score in the low average range and full scale and performance IQ scores in the average range. Her WAIS subtest scores were generally low average to average. On the Wechsler Memory Scales (WMS-III) indexes, she obtained generally low average to average scores. Of note is that her working memory index score was in the average range. In August 2006, she showed some concentration difficulties and some blunting in her affect. She also had problems with serial calculations. However, her mental status examination was otherwise [normal]. She was fully oriented. She performed well on immediate and five-minute recall of items. She could follow a three-step command. She adequately interpreted similarities and differences. She displayed good judgment and insight.

(AR 45, 48.)

In challenging the conclusion as to detailed work, plaintiff describes Dr. Valeithian's January and February 2006 testing results. (Dkt. 15 at 9-11 (citing AR 759-73, 826-28).) Dr. Valeithian opined that the results were consistent with plaintiff's reported learning disabilities. (AR 766-69.) She assessed plaintiff with moderate limitations in her ability to understand, remember, and follow complex (more than two step) instructions and to learn new tasks, and

marked limitations in her ability to exercise judgment, make decisions, and respond appropriately to and tolerate normal work pressures and expectations. (AR 826-27.)[3]

Plaintiff takes issue with the ALJ's reliance on her class attendance and part-time work over the opinions of Dr. Valeithian. She asserts an absence of evidence as to the difficulty of her classes, how well she understood the material, or whether she was able to graduate, and points to her mother's April 2009 testimony that she was unable to complete a class due to mental and physical issues. (AR 331.) Plaintiff also points to her testimony that, at the teriyaki shop, she served customers and peeled vegetables between six and twelve hours a week. (AR 93-94.)

Plaintiff further asserts that the ALJ failed to adequately address other medical opinions addressing her cognitive problems. She points to the August 2006 report from examining physician Dr. Shamin Gopinath diagnosing her with schizoaffective disorder and describing her as presenting "with significant mood and psychotic symptoms of longstanding nature as well as learning difficulty and chronic pain complaints[,]" and as exhibiting "significant blunted affect, difficulty with processing, and apparent cognitive blunting." (AR 835-40.) Plaintiff also points to the 2006 and 2007 opinions of reviewing psychologists Drs. Arthur Lewy and Alex Fisher that she suffered from schizoaffective disorder and could follow only simple one and two step instructions. (AR 880 and 917.)

Plaintiff argues that, at the very least, the ALJ should have further developed the record with respect to her learning disabilities in accordance with the recommendation of Dr.

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3 Plaintiff mistakenly stated in her opening brief that Dr. Valeithian assessed marked limitations in relation to concentration, persistence, and pace.

Schulman. (AR 846 (noting plaintiff's report of a learning disability and trouble reading and stating that "further evaluation of this might be necessary.")) She asserts that the ALJ should have then considered the combined effect of her learning disabilities along with her chronic pain, bipolar/schizoaffective disorder, and the side effects of her numerous medications. *See, e.g.*, *Lester*, 81 F.3d at 829 ("The claimant's illnesses 'must be considered in combination and must not be fragmentized in evaluating their effects.'") (quoted sources omitted) and SSR 96-7p (ALJ must consider side effects of medication).

Plaintiff's arguments raise the question of whether the ALJ adequately addressed the medical opinions from the examining and reviewing physicians discussed above. In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester*, 81 F.3d at 830 Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "'clear and convincing'" reasons. *Id*. (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id*. at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ may reject physicians' opinions "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751). Rather than merely stating her conclusions, the ALJ "must set forth [her] own interpretations and explain why they, rather than the doctors', are correct." *Id*. (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir.

1988)).

In support of his conclusion that plaintiff retained the ability to perform detailed work, the ALJ described the testing results from Dr. Valeithian as falling within the low average to average range. (AR 48 (citing AR 765-70).) He also pointed to Dr. Gopinath's report, which stated that, while "she showed some concentration difficulties and some blunting in her affect[]" and "also had some problems with serial calculations[,]" "her mental status examination was otherwise [normal,]" she was "fully oriented[,] . . . performed well on immediate and five-minute recall of items[,] . . . could follow a three-step command[,] . . . adequately interpreted similarities and differences[,]" and "displayed good judgment and insight." (*Id*. (citing AR 835-40.)

The ALJ addressed the specific limitations assessed by Dr. Valeithian:

> First, as I discussed above, I find that the claimant's bipolar disorder and learning disorder are non-severe. Second, I do not find support for Dr. Valeithian's assessment of the claimant's ability to learn new tasks. In 2008, the claimant was able to work part-time at a teriyaki restaurant without any reported cognitive difficulties; she stopped doing this job only because there was not enough work. Third, Dr. Valeithian's assessment of the claimant's ability to exercise judgment and make decisions is inconsistent with the mental status examination she administered in January 2006. At that time, the claimant showed good judgment and fair insight. Fourth, Dr. Valeithian's assessment of the claimant's social functioning is inconsistent with the claimant's activities. The claimant gets along well with family and friends. She previously lived with her mother and now lives with her brother. She goes shopping, to the movies, and out to dinner with friends. She maintains a good relationship with her ex-boyfriend. She occasionally baby sits a friend's infant. She attends church weekly. She has no history of problems interacting with coworkers or supervisors. Finally, I discount Dr. Valeithian's assessment of the claimant's ability to relate appropriately and tolerate the expectations of a normal work setting. This opinion is largely based on the claimant's subjective complaints, which I find are not fully credible. Also, the opinion is inconsistent with the mental health evidence, which indicates that the claimant's symptoms have significantly improved with psychiatric medication and counseling.

(AR 50; internal citation to record omitted.) The ALJ also, in deeming plaintiff's learning disorder non-severe at step two, relied on the fact that plaintiff had not reported any problems remembering, concentrating, completing tasks, or handling written or spoken instructions in completing forms as to her functional abilities (AR 43, 289, 317), did not testify as to any cognitive problems in relation to her work at the restaurant (AR 43, 93-94, 108), performed that restaurant work, and took classes in child development (AR 43.) He additionally, in finding moderate difficulties with concentration, persistence, and pace, considered the fact that plaintiff does puzzles and manages her finances. (AR 44.)

The ALJ also addressed the opinions of Drs. Lewy and Fisher that plaintiff could follow simple one and two step instructions, concentrate for up to two hours at a time, and should have limited contact with the public. (*Id.* (citing AR 878-80, 917 (assessing plaintiff as moderately limited in her ability to understand, remember, and carry out detailed instructions and to interact appropriately with the general public).) The ALJ gave "some weight" to these opinions, explaining:

> However, based on the claimant's WAIS and WMS-III results as well as her activities, which include taking courses at Renton Technical College in 2006 and 2007 and working part-time at a teriyaki restaurant in 2008, I find that she retains the ability to perform simple and detailed, but not complex, tasks. Giving the claimant's social activities, which include going to church, spending time with family and friends, shopping and going outside daily, I find that the claimant can interact appropriately with the general public without any significant limitations.

(*Id.*)

The ALJ did not directly assess the report from Dr. Gopinath. However, as noted above, he relied on the report in reaching his conclusion as to plaintiff's ability to perform

simple and detailed, but not complex, tasks. (AR 48 (citing AR 835-40).) He also cited the report in support of the conclusion that plaintiff's manic symptoms and auditory hallucinations were controlled by medication, that she had mild restrictions in activities of daily living, and that she retained the ability to perform simple and detailed, but not complex, tasks. (AR 43-44, 48 (citing AR 835-36).)

The medical opinions do provide support for a conclusion that plaintiff should not perform detailed tasks. However, the ALJ adequately countered those opinions with contrary evidence, including testing results from Drs. Valeithian and Gopinath, and plaintiff's failure, on two separate occasions, to identify any problems remembering, completing tasks, concentrating, understanding, or following written or spoken instructions (AR 289, 317 (plaintiff stated that she followed written and spoken instructions "good" on one occasion and "well" on another).) Also, while her class work and prior part time employment might not alone be persuasive evidence of her ability to perform detailed work, these factors were appropriately considered by the ALJ as relevant to the decision.

Given the reasoning provided by the ALJ and excerpted above, plaintiff fails to establish error in the assessment of the opinions from Drs. Valeithian, Lewy, and Fisher. Arguably, it could be found that the ALJ erred in not directly addressing the report from Dr. Gopinath. He did not, for instance, recount various portions of the report favorable to plaintiff. (*See*, *e.g.*, AR 840 (finding plaintiff's prognosis "guarded as she appears to have had persistent depressive symptoms as well as ongoing psychotic symptoms despite medication management[]" and noting plaintiff "exhibited numerous difficulties in intellectual functioning[,]" and "limited ability to focus and concentrate and significant blunting of the

affect.")) However, he did not necessarily reject Dr. Gopinath's opinions and, in fact, relied on his findings in finding plaintiff capable of performing simple and detailed tasks. (AR 48, 840.) Also, although not noted by the ALJ, Dr. Gopinath opined: "At this time, the claimant's suitability to return to work would be good should her mood and psychotic symptoms be under adequate control with appropriate medication and psychosocial intervention." (*Id*.) The Court finds that the ALJ adequately addressed the opinions contained in Dr. Gopinath's report. However, because this matter requires remand for other reasons, the ALJ should take the opportunity to directly address and assign weight to the report from Dr. Gopinath.

The Court must also address whether plaintiff persuasively establishes that the ALJ should have further developed the issue of her learning disabilities, and/or the combined impact of her learning disabilities along with her chronic pain, bipolar/schizoaffective disorder, and the side effects of her medications. In addition to Dr. Schulman's assertion that further evaluation of plaintiff's asserted learning disability "might be necessary[]" (AR 846), both Dr. Valeithian and Dr. Gopinath addressed the possible need for further information on this issue. (AR 770, 828 (Dr. Valeithian indicated that additional achievement testing was necessary to diagnose or rule out specific learning disabilities and explained that the necessary test was not authorized for use in the DSHS evaluation he conducted) and (AR 840 (Dr. Gopinath noted plaintiff's report of a learning disability diagnosis and stated: "However, outside neuropsychological testing and intelligence testing has not been provided to substantiate this diagnosis.”))

As reflected above, the "ALJ's duty to develop the record further is triggered only when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence." *Mayes*, 276 F.3d at 459-60. *See also Tonapetyan v. Halter*, 242 F.3d 1144,

1150 (9th Cir. 2001) ("Ambiguous evidence, or the ALJ's own finding that the record is inadequate to allow for proper evaluation of the evidence, triggers the ALJ's duty to 'conduct an appropriate inquiry.'") (quoted source omitted). In this case, the Court does not find reversible error. As argued by the Commissioner, the ALJ accepted the existence of a learning disability, relying on Dr. Valeithian's report, but nonetheless found that this impairment did not result in any significant functional limitations, providing several legitimate reasons for this conclusion, and pointing to the prior ALJ's reasoning. The ALJ also provided reasoning for the specific RFC finding that plaintiff could perform simple and detailed, but not complex, tasks. Additionally, while plaintiff states in her reply that the record suggests her tremor may have been a side effect of medication, this assertion alone does not establish a functional impact resulting from medications, *Thomas*, 278 F.3d at 960 (claimant offered "no objective evidence that her medications affected her concentration or caused dizziness[]"), or even suggest a side effect relevant to the cognitive limitations at issue in this argument. For these reasons, plaintiff fails to establish the need for further evaluation of this issue on remand.

Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently specific findings, supported by substantial evidence. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834. "We require the ALJ to build an accurate and logical

bridge from the evidence to her conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

The ALJ in this case found plaintiff's statements concerning the intensity, persistence, and limiting effects of her symptoms not credible to the extent inconsistent with the RFC assessment, providing the following reasoning:

> The claimant is not fully credible. The objective evidence does not corroborate her complaints of disabling back pain. For instance, in August 2006, she had some decreased dorsolumbar range of motion, but negative straight leg raising bilaterally. She did not have any paravertebral muscle spasm, crepitus, or effusion. She had 4/5 muscle strength throughout the upper and lower extremities. She had intact sensation to pinprick, vibration, and position in the bilateral lower extremities. She had intact sensation to pinprick, vibration, and position in the bilateral lower extremities. She had no difficulty moving around the examination room, including getting on and off the examination table or removing her shoes and socks. In June 2008, x-rays of the lumbar spine revealed spondylolisthesis of L5 on L1, with a pars defect at that level, and only minor degenerative changes at L4-5 and L3-4. On examination in November 2008, she had some reduced range of motion in the back. There was no evidence of guarding, rigidity, or spasm. She had excellent strength and normal sensation throughout the lower extremities, with normal range of motion and no evidence of instability. A straight leg raise did not produce pain. In February 2009, inspection of the back was unremarkable. She had some limitations on range of motion, but no tenderness to palpation throughout the mid to lower back. She had essentially 5/5 motor strength in the lower extremities, with grossly intact sensation bilaterally. She had a negative straight leg raise bilaterally.
>
> While the claimant has some upper extremity problems, her limitations are not

as severe as she alleges. For instance, in August 2006, she had decreased range of motion in the shoulder joints, but full range of motion in the elbows, forearms, wrists, and thumbs bilaterally. She had 4/5 motor strength in both upper extremities, including 4/5 grip strength. Dr. Schulman did not find any evidence of any significant manipulative restrictions. In November 2008, she had normal strength, sensation, and reflexes bilaterally in the upper extremities. She had normal range of motion in the upper extremities without pain and with no evidence of deformity or instability.

Although the claimant has a congenital deformity in her feet, involving the loss of multiple toes bilaterally, and a history of left ankle repair in October 2005, the record does not support her testimony that she could stand and walk for only a few blocks. For example, in February 2006, after undergoing a month of physical therapy following her left ankle surgery, she was discharged with the goal of tolerating walking for up to 40 minutes having been met. On examination in February 2006, Nicholas Heath, DPM, reported that the claimant had normal range of motion and excellent stability in the left ankle, with no swelling. In August 2006, she had an essentially normal gait. She could walk on her heels and in tandem without difficulty. She did not require a device to assist with ambulation. She had 4/5 motor strength throughout the lower extremities. Dr. Schulman found no evidence of standing or walking restrictions. In November 2008, the claimant did not have an obvious limp or encumbrance on ambulation. She had normal coordination in both lower extremities. She had excellent strength throughout the lower extremities, with no signs of instability. In February 2009, she had essentially 5/5 motor strength throughout the lower extremities including dorsiflexion and plantar flexion of the ankles and eversion of the feet. Dr. Blair also reported that the claimant could ambulate on both heels and on her toes without difficulty throughout the room.

The credibility of the claimant's pain complaints is undermined by evidence of symptom magnification during examinations. For example, in August 2006, Dr. Schulman reported that, when directly observed in the examination room, the claimant walked incredibly slowly. But when not directly observed, the claimant ambulated with a normal gait and moved around the room without difficulty. In November 2008, Dr. Blair noted that the location of the claimant's lumbar pain complaints were higher than the location of the spondylolisthesis evidenced by her x-rays. In February 2009, Dr. Blair noted a positive Waddell's sign on inspection of the claimant's back.

While the claimant has difficulty hearing in a crowded environment or an environment with a lot of ambient noise, she hears relatively well in other settings with the help of hearing aids. For instance, in August 2006, she did not

> have any hearing difficulties during a consultative physical examination. She also did not have any apparent problems [listening] or responding to my questions at the hearing.
>
> With regard to mental problems, the claimant has a schizoaffective disorder. Although she has a history of auditory hallucinations, they have since been well-controlled by medication. Additionally, from February 2003 through October 2006, treatment notes from the claimant's psychiatrist, Jessy Ang, M.D., indicate that her mood symptoms have significantly improved with medication and counseling.
>
> . . .
>
> The claimant's activities indicate that she is capable of greater physical and mental functional capacity than alleged. She cares for her personal hygiene and grooming, prepares simple meals, does some housework, including the dishes and laundry, shops for food, can go out unaccompanied, and baby sits occasionally for her friend's young child. She gets along with family and friends. She lived with her mother for several years before moving in with her brother. She goes out with friends to movies, shopping, and dinner. She attends church weekly. She drives, does puzzles, and manages her finances. In 2008, she worked two to three hours per day for three to four days per week at a teriyaki restaurant, serving food and doing food prep. She left this work only because she was laid off due to lack of work. Prior to her job at the restaurant, she worked a couple of hours per week in home health care, watching a child with a disability. She stopped doing this job also because of lack of work. At the hearing, she testified that she currently lived with her brother. She reported doing most of the household cleaning and grocery shopping. She reported that she did her own cooking and laundry. She stated that she did not require help getting dressed.

(AR 46-48; internal citations to record omitted.) The credibility assessment also included the discussion of plaintiff's cognitive abilities, excerpted above. (AR 48.)

Plaintiff challenges the ALJ's finding that the objective evidence did not corroborate her complaints of disabling back pain as both legally and factually incorrect. She notes that a claimant need not produce objective medical evidence of pain. *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986). She points to numerous documents in the record supporting her back pain (Dkt. 15 at 13-14 (citing AR 740, 920, 926-27, 930, 932-34, 938-39, 941, and 944)),

and argues that the ALJ failed to consider fibromyalgia as a cause of her back pain.

Plaintiff next argues that the ALJ similarly erred in basing his decision as to her upper extremity problems on a lack of objective findings, and proffers contrary evidence and opinions as to associated limitations in handling, pushing, pulling, reaching, and range of motion. (AR 920, 926-27, 930, 938.) She describes this error as significant because all of her past relevant work and all but one of the jobs identified by the vocational expert require frequent reaching. (AR 122, 124.)

Plaintiff also asserts that her difficulty walking was attributable not only due to her congenital foot deformities, but also to residuals of ankle surgery, as well as back pain and fatigue. (AR 111.) She points to 2007 and 2008 reports from physician's assistant Warner reflecting that her feet were unstable and she should not stand for prolonged periods (AR 929-30) and describing her as having marked deformities of the feet and an antalgic gait (AR 925-26) (but assessing foot deformities as moderate in severity).

Plaintiff avers that Dr. Schulman's suggestion of symptom magnification is inconsistent with all of the other evidence in the record. She notes her report to Dr. Blair that she had experienced a sudden onset of mid back pain, higher than her previous low back pain, after lifting her niece (AR 941, 944), and asserts that Waddell signs reveal that a symptom may have a non-physical cause, but do not measure malingering. (*See* Dkt. 15 at 16 n.2 (citing an article reflecting no significant correlation between Waddell signs and malingering).)

Finally, plaintiff asserts that the cited exhibits in relation to her activities do not support the ALJ's finding, and notes the Ninth Circuit's recognition that "the mere fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car, or limited

walking for exercise, does not in any way detract from her credibility as to her overall disability." *Vertigan*, 260 F.3d at 1050. She also challenges the accuracy of the assertion that she left prior work due only to lack of work, pointing to her testimony that she could not perform the job in the teriyaki restaurant due to the standing requirements, pain in her feet and back, and fatigue, and could no longer perform companion work given the requirement to lift children out of their wheelchairs and in and out of cars. (AR 117-20.)

The Commissioner asserts that, because there was affirmative evidence of malingering in this case, the ALJ was not required to provide clear and convincing reasons for rejecting plaintiff's testimony. *Carmickle v. Comm'r of SSA*, 533 F.3d 1155, 1160 (9th Cir. 2008). Malingering "is the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as . . . avoiding work[.]" American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 739 (4th ed. 2000). In asserting malingering, the Commissioner points to plaintiff's prior denied applications for benefits (*see* AR 135), as well as provider notes in the record (AR 567 (March 2001 notes from Drs. Supriya Kelkar and Wayne Tsuji: "Patient brought in form for disabled parking for the DMV, and which we told her that she is not disabled and that we would not fill out the form for her.") and AR 817 (June 2003 note from ARNP Roberta Dacus: "I do not feel that it is warranted for her to be on disability and do not feel like that would be beneficial to her overall mental status and long term health care.")) He states that the ALJ discussed affirmative evidence of malingering in pointing to evidence of symptom magnification. (AR 47.) (*See also* AR 843 (Dr. Schulman noted plaintiff was only able to explain her medical problems "in very vague terms" and had "significant difficulty providing any detail on her

problems."; he also observed that she had no difficulty getting on or off the examination table or with removing socks and shoes).) The Commissioner notes that the article relied on by plaintiff in criticizing the relevance of Waddell signs was not before the ALJ, and provides his own citation regarding Waddell signs. (Dkt. 17 at 16.) The Commissioner further argues that the ALJ nonetheless did provide specific reasons for finding plaintiff not credible (*id*. at 16-19), and, as stated above, asserts that the ALJ's consideration of fibromyalgia would not have changed his findings, and that the ALJ accommodated plaintiff's upper extremity difficulties by a limitation to frequent reaching.

The Commissioner does not successfully support his assertion as to malingering. The ALJ need not make a specific *finding* of malingering. *Carmickle*, 533 F.3d at 1160 n.1. Instead, the question is whether there is affirmative evidence of malingering. *Id*.; *accord Smolen*, 80 F.3d at 1283-84. In this case, the ALJ provided several examples of what he perceived as evidence of symptom magnification. While one or more of the examples were appropriately relied upon, it is not at all clear that the evidence of symptom magnification demonstrates affirmative evidence of malingering. *See, e.g.*, *Sandoval v. Astrue*, No. CV-08-0303-CI, 2009 U.S. Dist. LEXIS 121435 at * 12 (E.D. Wash. Dec. 31, 2009) (Mag. J. Imbrogno) ("Here, although the ALJ referenced observations by medical providers of symptom magnification, potential secondary gain factors and excessive pain behavior . . . , there is no affirmative evidence of malingering.") Nor do plaintiff's prior applications or the medical reports pointed to by the Commissioner, neither of which the ALJ relied upon, *see Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003) (district court erred in affirming based on evidence the ALJ did not discuss), constitute affirmative evidence of malingering.

In any event, the ALJ did provide clear and convincing reasons for finding plaintiff less than fully credible, including evidence of symptom magnification, unsupportive objective evidence in relation to her back, upper extremity, foot, hearing, and mental impairments, evidence of daily activities showing greater capacity than alleged, and evidence relating to her past work. "While subjective pain testimony cannot be rejected on the sole ground that it is not fully corroborated by objective medical evidence, the medical evidence is still a relevant factor in determining the severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); SSR 96-7p. *Accord Cotton*, 799 F.3d at 1407 ("[I]t is improper as a matter of law for an ALJ to discredit excess pain testimony *solely* on the ground that it is not fully corroborated by objective medical findings.") (emphasis added); *Burch v. Barnhart*, 400 F.3d 676, 680-81 (9th Cir. 2005) (minimal objective findings can, when other reasons are present, undermine a claimant's credibility). The ALJ in this case did not reject plaintiff's testimony based solely on the lack of corroborative objective evidence. Nor does plaintiff establish reversible error in the ALJ's consideration of the evidence relating to her back, upper extremity, and foot problems. While plaintiff points to evidence supportive of these problems, the ALJ pointed to contrary evidence and appropriately fulfilled his responsibility for resolving conflicts in the record. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041-42 (9th Cir. 2008).

The ALJ also appropriately considered plaintiff's daily activities and past work. *Light*, 119 F.3d at 792. The consideration of plaintiff's activities does not reveal an expectation that plaintiff needed to be "'utterly incapacitated' in order to be disabled." *Vertigan*, 260 F.3d at 1050 (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Also, while plaintiff testified

that she could not have performed her teriyaki restaurant job full-time due to various physical problems and could not now perform her companion work due to her limitations, she did testify, as noted by the ALJ, that she left her prior jobs due to a lack of work. (AR 93, 95-97, 117-20.)

Plaintiff does point to some arguable errors in the credibility assessment. Dr. Blair's observation as to a different location of back pain is explained by plaintiff's description of an incident of sudden onset of pain. (AR 941, 943-44.) Also, the relevance of the Waddell signs is unclear given the absence of any discussion within the physician's report. *See*, *e.g.*, *Lira-Iniguez v. Astrue*, 1:07-cv-01054 OWW GSA, 2009 U.S. Dist. LEXIS 23802 at *42-43, n.2 (E.D. Cal. Mar. 25, 2009) (noting that, while a physician identified Waddell signs, "he did not conclude that those signs meant Plaintiff was malingering or ascribe any significance to those signs[,]" and stating that, while the Commissioner pointed to an article supporting the conclusion that these signs "are an indication of symptom magnification or malingering[,]" it was "not the role of [the] Court to look beyond the evidence presented to the ALJ and/or engage in such an analysis.")

Given the existence of other valid reasons for the ALJ's decision, any errors in the credibility assessment can be deemed harmless. *Carmickle*, 533 F.3d at 1162-63. However, the ALJ's failures at step two could have implications on the credibility assessment. As such, the ALJ should reconsider plaintiff's credibility as needed on remand.

Lay Testimony

Lay witness testimony as to a claimant's symptoms or how an impairment affects ability to work is competent evidence. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ can reject the testimony of lay witnesses only upon giving reasons germane to each

witness. *See Smolen*, 80 F.3d at 1288-89 (finding rejection of testimony of family members because, inter alia, they were "understandably advocates, and biased" amounted to "wholesale dismissal of the testimony of all the witnesses as a group and therefore [did] not qualify as a reason germane to each individual who testified.") (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)).

The ALJ considered the lay witness testimony in this case as follows:

> I have reviewed lay witness statements. The record contains lay witness statements from the claimant's mother, ex-boyfriend, and stepsister-in-law. In May 2006, the claimant's mother, Nancy Staley, reported that the claimant had problems with hearing loss, deformed feet, depression, fibromyalgia, hand tremors, learning disability, and lower back pain. She did not believe that the claimant could ever earn a living wage on her own or find a job that would offer her medical benefits. She reported that the claimant had difficulty lifting, standing, sitting, squatting, kneeling, climbing stairs, walking, and hearing. She reported that the claimant had 60 percent hearing loss and wore hearing aids. In April 2009, she stated that the claimant's health problems were getting worse and worse. She stated that she did not know how the claimant would manage financially without Social Security. In April 2009, the claimant's stepsister-in-law, Nguyen Staley, reported that the claimant often complained of back, hand, and foot pain at family gatherings. She stated that the claimant wore orthotic shoes due to foot deformities. She reported that the claimant had very weak reading and writing skills. She stated that the claimant had so much pain and fatigue that the claimant could not work. In April 2009, Charles Shay, the claimant's ex-boyfriend, reported that the claimant had hearing problems even with hearing aids. He stated that the claimant had difficulty sitting and standing for any length of time. He reported that the claimant had a lot of difficulty understanding anything written.
>
> I give some weight to the statements of the claimant's family and ex-boyfriend, but only to the extent that they are consistent with the evidence. While the claimant has some limitations due to her physical impairments, they are not to the extent of disability. Recent examinations show fairly benign findings in the back, upper extremities, and lower extremities. Although the claimant has difficulty hearing in an environment with loud ambient noise, her hearing aids permit her to hear relatively well in other settings. While the claimant has been diagnosed with a learning disorder, I find that it is non-severe. In 2006 and 2007, she was taking college level classes in child development. In 2008, she

> worked part-time at a teriyaki restaurant without any reported cognitive problems. Considering also the claimant's other daily activities, I conclude that the claimant retains the physical ability to perform light exertional work and the mental ability to carry out simple and detailed, but not complex, tasks.

(AR 48-49.)

Plaintiff relies on *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009), in challenging the ALJ's assessment of the lay testimony. In that case, the Ninth Circuit held that "the ALJ should not have discredited [lay] testimony on the basis of its relevance or irrelevance to medical conclusions." *Id*. at 1116 (citing 20 C.F.R. § 404.1513(d) (providing that lay witness testimony may be introduced "to show the severity of [the claimant's] impairment(s) and how it affects [his] ability to work"); and *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993) ("[F]riends and family members in a position to observe a claimant's symptoms and daily activities are competent to testify as to her condition.")) The Court further held that an ALJ could not "discredit . . . lay testimony as not supported by medical evidence in the record." *Id*. (citing *Smolen*, 80 F.3d at 1289 ("The rejection of the testimony of [the claimant's] family members because [the claimant's] medical records did not corroborate her fatigue and pain violates SSR 88-13, 1988 SSR LEXIS 14, which directs the ALJ to consider the testimony of lay witnesses where the claimant's alleged symptoms are unsupported by her medical records.")) Plaintiff adds that, for reasons previously identified, the evidence related to her class attendance, prior work, and daily activities was either overstated or insufficient to draw any meaningful conclusions.

The Commissioner distinguishes the ALJ's reasoning in this case from that addressed in *Bruce*, asserting that the ALJ properly relied on the fact that the medical evidence *contradicted*

the statements of the lay witnesses. *Lewis*, 236 F.3d at 512 (contradictory medical records supported ALJ's rejection of lay testimony as to symptoms). He contends that the ALJ also appropriately relied on plaintiff's daily activities, college class attendance, and past work.

The Ninth Circuit has found that "[i]nconsistency with medical evidence is [a germane] reason [for discrediting lay testimony]." *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) ("The ALJ accepted the testimony of Bayliss's family and friends that was consistent with the record of Bayliss's activities and the objective evidence in the record; he rejected portions of their testimony that did not meet this standard. The ALJ's rejection of certain testimony is supported by substantial evidence and was not error.") *See also Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (finding germane the ALJ's reasoning that the statements of a lay witness were inconsistent with the claimant's presentation to treating physicians and with the claimant's failure to participate in treatment); *Lewis v. Apfel*, 236 F.3d 502, 512 (9th Cir. 2001) (contradictory medical records supported ALJ's rejection of lay testimony as to symptoms).

As asserted by the Commissioner, the Ninth Circuit's decision in *Bruce* can be distinguished. In that case, the Court rejected as improper the ALJ's reasoning that the lay testimony was "not supported by the objective medical evidence." 557 F.3d at 1116. The ALJ in *Bruce* did not point to any specific evidence, contradictory or otherwise, in support of this conclusion. Instead, the ALJ appeared to discount in general the value of lay testimony in comparison to objective medical evidence. S*molen*, cited in *Bruce*, can be similarly distinguished. In that case, the Court noted that the claimant's disability was based on fatigue and pain, that the medical records were "sparse" and did not "provide adequate documentation

of those symptoms[,]" and that, pursuant to SSR 88-13, the ALJ was consequently required to consider the lay testimony as to those symptoms. 80 F.3d at 1288-89. The ALJ in *Smolen*, therefore, had erred in rejecting the lay testimony because "'medical records, including chart notes made at the time, are far more reliable and entitled to more weight than recent recollections made by family members and others, made with a view toward helping their sibling in pending litigation.'" *Id*. at 1289. As in *Bruce*, the ALJ essentially rejected the value of lay testimony as compared to objective medical evidence.

The ALJ in this case did not point generally to a lack of support from objective medical evidence, or otherwise undervalue lay testimony as a general matter. Instead, he gave weight to the statements to the extent consistent with the evidence, but found contradictory evidence in the record, including "fairly benign" objective findings, evidence showing plaintiff was able to hear relatively well in settings without loud ambient noise, and evidence contradicting the severity of plaintiff's learning disorder, as well as plaintiff's activities, in general and specifically in taking classes and in her prior work. (AR 49.) These reasons were both valid and germane. Accordingly, the ALJ's assessment of the lay testimony withstands scrutiny.

Step Four

At step four, the ALJ must identify plaintiff's functional limitations or restrictions, and assess her work-related abilities on a function-by-function basis, including a narrative discussion. *See* 20 C.F.R. §§ 404.1545, 416.945; SSR 96-8p. RFC is the most a claimant can do considering her limitations or restrictions. *See* SSR 96-8p. The ALJ must consider the limiting effects of all of plaintiff's impairments, including those that are not severe, in determining RFC. §§ 404.1545(e), 416.945(e); SSR 96-8p.

Although plaintiff bears the burden at step four, the ALJ retains a duty to make factual findings to support his conclusion, including a determination of whether a claimant can perform the actual demands and job duties of her past relevant work *or* the functional demands and job duties of the occupation as generally performed in the national economy. *Pinto v. Massanari*, 249 F.3d 840, 844-45 (9th Cir. 2001) (citing SSR 82-61). "This requires specific findings as to the claimant's [RFC], the physical and mental demands of the past relevant work, and the relation of the residual functional capacity to the past work." *Id*. (citing SSR 82-62).

Plaintiff raises many arguments in relation to step four. She contends that the ALJ understated her limitations by disregarding her testimony, lay testimony, and medical source opinions assessing various limitations and finding her capable of only sedentary work. (Dkt. 15 at 19-20.) She argues that the ALJ made inadequate findings of fact as to the demands of her past relevant work, particularly the mental demands. *See* SSR 82-62 ("Detailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate. . . . [F]or a claim involving a mental/emotional impairment, care must be taken to obtain a precise description of the particular job duties which are likely to produce tension and anxiety, e.g., speed, precision, complexity of tasks, independent judgments, working with other people, etc., in order to determine if the claimant's mental impairment is compatible with the performance of such work.")

Plaintiff points to the physical demands of her companion job, noting the vocational expert's (VE) classification of this job as light and her testimony that she had to lift children in and out of wheelchairs and carseats, which presumably requires the ability to lift more than twenty pounds. (AR 118-20.) Plaintiff avers that the ALJ erred in failing to specify whether

he found her capable of performing her past work as generally or actually performed. She asserts that it is not clear whether she performed this job long enough for it to be considered SGA, given that she performed it only ten hours a week for three months. (AR 262.)

Plaintiff asserts that the frequent reaching, handling, and fingering in the companion job, and the frequent reaching and handling and occasional fingering in the retail sales job (AR 122) would be precluded by her shoulder, elbow, and hand pain, and her hand tremor (AR 117). She asserts that the ambient noise in the retail job would be precluded by the ALJ's recognition that she could not perform a job requiring hearing in an environment with loud ambient noise. She also avers that the evidence supports a limitation to simple tasks, corresponding with unskilled work (AR 129), rather than the semi-skilled jobs identified at step four (AR 122-24). Lastly, plaintiff asserts that the General Educational Development (GED) requirements of the jobs identified at step four exceed her abilities, even based on the ALJ's findings, noting that she exhibited problems in the relevant areas on cognitive testing. (*See* Dkt. 15 at 22; AR 122-24.) *See also* Dictionary of Occupational Titles (DOT) (4th Rev. Ed. 1991), App. C.

With the exception of hand tremors and fibromyalgia, plaintiff does not demonstrate reversible error in the ALJ's consideration of her testimony, lay testimony, or medical source opinions as to her physical or mental impairments and resulting limitations. Many of these arguments are addressed above in relation to other aspects of the ALJ's decision. Also, as asserted by the Commissioner, the ALJ addressed the conflict in the record between medical opinions as to whether plaintiff could perform sedentary or light work, and adequately supported his conclusion that she could perform work at the light level. (AR 49 (finding that a restriction to light work was consistent with the objective findings, "which have been generally

benign[,]" and plaintiff's activities (including caring for her personal hygiene and grooming, preparation of simple meals, performance of household chores, babysitting, shopping, going to movies, driving, and church attendance) and her prior work).)

Plaintiff does not establish that the hypothetical proffered to the ALJ failed to properly account for the RFC assessed. *Bayless v. Barnhart*, 427 F.3d 1211, 1217-18 (9th Cir. 2005) ("The hypothetical that the ALJ posed to the VE contained all of the limitations that the ALJ found credible and supported by substantial evidence in the record. The ALJ's reliance on testimony the VE gave in response to the hypothetical therefore was proper."); *Batson v. Comm'r of the SSA*, 359 F.3d 1190, 1197 (9th Cir. 2004) ("The ALJ was not required to incorporate evidence from the opinions of . . . treating physicians[] which were permissibly discounted.") Indeed, many of plaintiff's step four arguments, such as that relating to ambient noise and GED requirements, are cursory and insufficient to establish reversible error.

Nor does plaintiff establish error in the consideration of the demands of her past relevant work. A plain reading of the testimony reveals the consideration of the jobs at issue according to their description in the DOT. (AR 122-24.) The DOT is generally considered the best source for determining how past relevant work is generally performed. *Pinto*, 249 F.3d at 845-46. *See also Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995) (DOT raises rebuttable presumption as to job classification). Also, the ALJ noted plaintiff performed her work as a companion "part-time over a one to two year period[,]" and concluded she performed the work "long enough to acquire the skills necessary for the job[]" and that the work was both "gainful activity and past relevant work." (AR 51, n.1.) Plaintiff does not sufficiently challenge this finding.

However, reassessment of the evidence relating to plaintiff's hand tremor and fibromyalgia may impact the ALJ's step four conclusion. Accordingly, on remand, the ALJ should reconsider this step as necessary.

Step Five

Plaintiff avers the ALJ's failure to meet his burden at step five because the RFC and hypothetical to the VE did not accurately reflect her limitations. She again asserts that the evidence supports a limitation to sedentary work and with greater restrictions in reaching, handling, and/or fingering. She also maintains that her pain and fatigue prevented her from working on a regular and continuing basis, as is required for a finding of disability, *see* SSR 96-8p, and points to the VE's testimony that an individual who misses more than three days a month due to absences or tardiness could not perform any work (AR 127-28). Plaintiff avers that eliminating two or even just one of the jobs identified at step five prevented the ALJ from meeting his burden, and that the Court cannot draw a factual conclusion that any remaining number of jobs would be significant. *Allen v. Barnhart*, 357 F.3d 1140, 1143-44 (10th Cir. 2004).

As reflected in the step four argument above, a hypothetical posed to a VE must include all of the claimant's functional limitations supported by the record. *Thomas*, 278 F.3d at 956 (citing *Flores v. Shalala*, 49 F.3d 562, 520-71 (9th Cir. 1995)). A VE's testimony based on an incomplete hypothetical lacks evidentiary value to support a finding that a claimant can perform jobs in the national economy. *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) (citing *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th Cir. 1991)).

Again, plaintiff does not establish that the ALJ presented a deficient hypothetical or

otherwise improperly relied on the VE's testimony. (*See* AR 52.) Moreover, even if plaintiff had established her inability to perform one or more of the jobs identified at this step, she ignores Ninth Circuit precedent supporting a district court's finding of harmless error based on the existence of a significant number of remaining jobs. *See, e.g.*, *Meanel v. Apfel*, 172 F.3d 1111, 1114-15 (9th Cir. 1999) (indicating that the court need not address a claimant's arguments regarding one of two jobs identified by the ALJ given that the number of positions for one of those jobs – between 1,000 and 1,500 in the local area – constituted a significant number); *Barker v. Secretary of Health & Human Servs.*, 882 F.2d 1474, 1479 (9th Cir. 1989) (although declining to exclude certain jobs identified, finding that, even if those jobs were excluded, the remaining jobs – 1,266 jobs in the Los Angeles/Orange County area – constituted a significant number). *See also, e.g.*, *Meissl v. Barnhart*, 403 F. Supp. 2d 981, 982 & n. 1 (C.D. Cal. 2005) (ALJ's step five decision would still be supported by substantial evidence even without consideration of one of two jobs identified by the ALJ given that the numbers for the other job – approximately 1,700 locally and 38,000 nationally – was significant) (citing *Barker*, 882 F.2d at 1479).

However, as with step four, the errors identified at step two could have implicated the ALJ's step five finding. As such, on remand, the ALJ shoulder reconsider step five as needed.

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CONCLUSION

For the reasons set forth above, this matter should be REMANDED for further administrative proceedings. A proposed order accompanies this Report and Recommendation.

DATED this 27th day of July, 2010.

Mary Alice Theiler
United States Magistrate Judge